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Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners and complainants,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF ON BEHALF OF COMPLAINANTS.

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MAXWELL EVARTS,
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D. T. WATSON,
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Of counsel for petitioners and complainants.

WASHINGTON, February 27, 1905.

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I.

Much of the argument submitted in defendant's first brief is devoted to the contention that the railroad system of the Union Pacific Railway Company, which owns the stock of the complainant Oregon Short Line Railroad Company, is a parallel and competing line with the Northern Pacific Company (see complainants' brief, pp. 166–177). The relevancy of this argument is not perceived. It is indisputable that the Oregon Short Line Company owned the majority of the Northern Pacific stock in November, 1901, and the only question now before the court is whether com-

[1] Defendant has so far filed three briefs and a voluminous compilation of authorities. For convenience of reference, the brief signed by Messrs. Root and Stetson, which was the first filed, will be referred to as "defendant's first brief," that signed by Messrs. Johnson, Griggs and Clough as "defendant's second brief," and that signed by Mr. Thacher as "defendant's third brief."

plainants are entitled to the return of that property so far as it can be traced and identified.

But it may be interesting to call attention to the fact appearing in the record that if the Union Pacific Railroad be parallel to and compete with the Northern Pacific Railroad, so also must the Burlington Railroad be a parallel and competing line with the Northern Pacific. Indeed, all the reasons so eloquently advanced in the Government suit to explain and excuse the purchase of Burlington shares and the "alliance" then made and the suppression of competition through the "manifest interest of each company" (record, p. 96) to the illegal copartnership, apply with infinitely more force and reason in favor of an alliance between the Northern Pacific and the Union Pacific Systems. If it be true that the Northern Pacific, through the Burlington lines, is enabled to reach the best markets for the products of the Northern Pacific territory, obviously it can reach those markets and many others much more easily and readily through a connection with the Union Pacific, and the people of the Northern Pacific territory would thereby save hundreds of miles of unnecessary haul and millions of dollars of unnecessary freight. The answer of the Northern Securities Company in the Government case alleged that the Burlington lines traversed the states of "Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas and Colorado, which afford the best markets for the lumber of the Pacific coast," and reached "Denver, Kansas City, Omaha and Aurora, where are located the principal smelters of silver-lead ores, such as are mined near the lines of the

defendant railway companies" [*i. e.*, the Northern Pacific and Great Northern], and "Omaha, Kansas City and Chicago, where are the great packing houses and the great markets for the cattle and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon and Washington," and also reached "St. Louis and Kansas City, connecting there with lines traversing the cotton States, from which come raw and manufactured cotton required for shipment to China and Japan" (record, pp. 93, 94). It is then added in the same answer (p. 94) that the joint purchase by the Great Northern and Northern Pacific companies, two competing lines, of the Burlington stock, was "the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the Great Northern and Northern Pacific lines, and by their connecting lines of shipping on the Pacific coast," and that "these connections and such interchange of traffic were deemed to be and are *indispensable* to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in the competition with the more southerly lines to the Pacific coast, with the Canadian

Pacific railway, and with European carriers, for the trade and commerce of the Orient." If all this be true in respect of the alliance then made and of any close connection between the Northern Pacific and Burlington roads, how much more true must it be of a connection between the Northern Pacific and Union Pacific Systems?

The Union Pacific System traverses and reaches practically the same markets in Nebraska and Northern Colorado as the Burlington does, but in addition it traverses and reaches the fertile territories and rich markets of Kansas, Southern Colorado, Utah, Nevada, Idaho, Oregon, California, Arizona, New Mexico, Texas, Louisiana and Mexico.

Complainants, it should be added, are not quite so disingenuous as to contend that the Burlington railroad is not parallel and competing with the Union Pacific railroad in Nebraska and part of Colorado. We may leave that to the solemn denials interposed by the Northern Securities Company in the Government suit (complainants' brief, pp. 174–175). But complainants do contend that, apart from two or three limited localities, the Union Pacific and the Northern Pacific reach, traverse and serve different territories, different communities and different markets, that they are not in any just or legal sense parallel or competing (*Louisville & Nashville R'd* v. *Kentucky*, 161 U. S. 677, 698), and that the communities served by each of these systems would be immeasurably benefited by a free and uninterrupted interchange of traffic and products in the natural flow of commerce north and south.

II.

The defendant Northern Securities Company in its first brief, discussing the plan of *pro rata* distribution, speaks of "the steady dispersion of the stock of the Securities Company," and of "the reasonable probability that a ratable distribution according to such widely extended interests would accord most nearly with the purposes of the Government which is the administrator of the Anti-Trust law and of the courts that granted the decree in the Government suit" (p. 27).

If the court will refer to complainants' principal brief, it will be seen that there is no proof before the court that the stock has been dispersed or widely distributed (see pp. 119–123). On the contrary, for anything that appears, practically all the stock issued in exchange for the Great Northern and Northern Pacific shares may still be held by the original depositors.

The defendant's first brief then proceeds to state (pp. 27, 30):

> "This condition was readily comprehended by the Government, and by the Attorney-General, who, from the first fully advised of the present plan of ratable distribution, *expressed himself satisfied.* . . .
>
> "The question whether the proposed ratable distribution would be in violation of public policy, or would in any way promote the illegal purpose which it was the design of the Government suit to frustrate, has been decided by the Circuit Court in Minnesota which rendered the original decree in the Government suit, and *has been settled*, so far as it can be settled, *by the executive department of the Government charged with the enforcement of the statute.* In the intervention proceeding the Department of Justice has declared in sub-

> stance that the proposed distribution would have no such effect, and the Circuit Court decided that it would have no such effect."

The court will search in vain through the record in this case, or in the proceedings before the Circuit Court at St. Paul, for any evidence supporting these statements, if their intended meaning be comprehended. So far as appears, the "Government" and the "Attorney-General" have *not* expressed any opinion or intermeddled in any way in this litigation. There is not one word to show that the Executive of the United States or the Department of Justice has ever expressed satisfaction with the present scheme. On the contrary, the Attorney-General of the United States avoided answering Mr. Hill's letter of March 21, 1904 (record, p. 160), which was obviously written for the express purpose of securing some expression of approval on his part, for its effect on contemplated litigation. The position of the Attorney-General of the United States at St. Paul was stated in the paper that he filed, which practically amounted to an objection on his part to importing into the Government suit what seemed to him to be the subject-matter of a private controversy, which, as the Circuit Court in Minnesota said at St. Paul (128 Fed. Rep. 813), would have to be "settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers is competent to enforce." The statement filed by the Attorney-General, without

granting complainants any hearing, although requested, and without any investigation of the facts, will be found in the record of the proceedings before the court at St. Paul, copies of which complainants have filed in the office of the clerk of this court, and is as follows (p. 59):

> "I respectfully submit to the Court that notice has been served upon me that Edward H. Harriman, Winslow S. Pierce, and the Oregon Short Line Railroad Company will apply to the Judges of this Court for leave to intervene in this cause and to proceed and be heard in respect of the execution of the final decree of this Court entered on April 9, 1903, as affirmed by the Supreme Court of the United States, and for such other or further or different order or relief as to the Court may seem meet.
>
> "*The United States neither admits nor denies the allegations of the petition, but objects to the proposed intervention.*[1]
>
> "This case was heard by this Court on bill, answer and testimony, and a final decree was entered, enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States, the decree of this Court was affirmed in every particular, the effect of which was to end and close the case.
>
> "The United States stands on the decree as affirmed, and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms.
>
> "P. C. KNOX,
> "Attorney-General."

It will be assumed that the Executive has scrupulously avoided any expression of opinion, and that any

[1] Italics are ours.

interference or suggestion on its part, however conveyed, would be regarded by this court as improper.

III.

On page 21 of the same brief, the following statement is emphasized with italics:

> "*After the conclusion of that hearing* [motion for a preliminary injunction before Judge Bradford] *the complainants filed their second amended bill.*"

The object of this emphasis may have been to suggest to the court that in some way or other the defendant Northern Securities Company was placed at a disadvantage by the delay in filing the second amended bill, and that if this bill had been filed before the argument of the motion for a preliminary injunction, the defendant might have pleaded, or might have disclosed in the usual way the nature of its defense, or its affidavits might have been more fully and candidly responsive to the verified bill and supporting affidavits.

As matter of fact, however, the second amended bill was filed on the 4th of June, 1904 (record, p. 1); the Circuit Court filed its opinion on the 15th of July, 1904 (p. 321), and the injunction order was not entered until the 18th of August, 1904 (p. 344). All this time, the defendant never intimated that it wished to plead or supplement its imperfect and evasive affidavits, even when the Circuit Court criticized them (p. 342).

Indeed, defendant's second brief says (p. 16):

> "The filing of the second amended bill was not followed by any request, from either side, to reopen the application and submit additional proofs or arguments."

Surely, it cannot now lie with the defendant to plead any prejudice or to exculpate itself for the insufficiency of the denials of the verified allegations of the bill and moving affidavits because of the delay in filing the second amended bill in view of the stipulation entered into by its own counsel at the time of the entry of the order granting leave to file such amended bill (record, p. 360), viz.,

> "We hereby waive notice of application for the foregoing order and have no objection to the making thereof, it being understood and agreed that the pending motion for a special injunction shall be determined upon the second amended complaint and the papers and briefs heretofore submitted and upon the supplemental briefs which are to be filed on or before Tuesday, June 14th, 1904, *all as though the second amended bill of complaint had been filed preceding the oral argument.*"

In defendant's second brief, we also find an argument somewhat difficult to follow, based apparently upon the fact that Mr. Harriman did not verify the second amended bill, and concluding with the assertion that "to every intent, therefore, the bill is a mere unverified pleading" (p. 21).

As matter of fact, two of the complainants verified the bill, and there may have been reasons why Mr. Harriman did not verify the second amended bill. For example, Mr. Harriman might then have been in Europe. He had, however, already made a full affidavit in which he had verified the amended bill by practically incorporating it in his affidavit (record, p. 155), and the second amended bill was only filed because it had been suggested on the oral argument by defendant's own counsel

that proper pleading required the complainants to set forth the terms of the alleged illegal combination and then to plead the decree in the Government suit as *res adjudicata*, which was done.

It is further stated in defendant's second brief (p. 34):

> "It is not claimed that in these negotiations J. P. Morgan & Co. acted for the Securities Company, or had any authority to do so."

If the court will refer to the testimony of Mr. Perkins and Mr. Steele, members of the firm of J. P. Morgan & Co., in the Government suit, set forth in the present record, it will be seen that Messrs. J. P. Morgan & Co. did act for the Securities Company in those transactions (record, pp. 164–165).

It is then stated in regard to questions of additional proof on final hearing that "*No such proof is tendered here by these plaintiffs. They do not even offer to make any at some future time*" (defendant's second brief, p. 35).

In the Circuit Court, in the Circuit Court of Appeals, and in this court, complainants have urgently asked the opportunity to make proof as to all the allegations of their bill, which proof they believe will conclusively establish the facts as alleged.

IV.

The defendant's first brief then states (p. 22) that—

> "All parties agree that now is presented for consideration and final determination by this Court the question whether the decree in the Government suit concerned and decided as between themselves the mutual rights of the parties to this suit."

In order to prevent any misunderstanding, it is proper to repeat that in the court below, in the petition for a writ of certiorari, and in the briefs now filed, the complainants' counsel have endeavored to make it as plain as language can express any idea of the human mind that in their view the case is not ready for final determination, that proofs are necessary, that upon the cross-examination of the defendant's directors and officers much would be disclosed, and that the Circuit Court of Appeals erred in proceeding to dispose of the whole controversy on an appeal from an order granting a preliminary injunction. It has been consistently urged that it would be in contravention of the established rules of equity procedure and of all precedents regulating appeals, for this court now to sanction the practice of the court below as an appellate tribunal, and finally determine the controversy in the absence of a final hearing in the court of original jurisdiction. The reason why complainants' counsel have discussed the merits at length, is not because they agree that in any aspect the case should be finally determined on this hearing, but because the questions of law on the merits will arise upon final hearing, and the court may, therefore, "think it proper to now look into [the allegations] *simply* for the purpose of determining whether, assuming them to be facts, the [complainants] below made out a case which would entitle [them] to recover the [railroad stocks] in suit." (Mr. Justice Peckham in *City of Oklahoma City* v. *McMaster*, decided February 20, 1905, but as yet unreported.)

It is conceived that, if the court does pass beyond the

question of due equity procedure and discuss the points of law presented on the merits, it will only be to declare the rules of law as to the effect of contracts in violation of an act of Congress, as to the effect of the decision in the Government suit, as to the operation of estoppels, as to restoration of the *status quo* if practicable on the dissolution and abandonment of an unlawful combination, etc.; in a word, to declare the general principles and rules of law which should govern the legal rights of the parties if the facts on final hearing remain unchanged.

V.

The defendant's first brief further asserts (p. 23) that—

> "The contentions of the defendant have been fully sustained by *every* court that has considered the merits at all, and have not been denied upon the merits by any court or judge."

As matter of fact, the court at St. Paul avoided passing upon the merits of the controversy (complainants' brief, pp. 125–129).

The Vice-Chancellor in the Continental suit did not have the merits before him. The suit was not brought by an original depositor, and the remarks of the court were clearly *obiter dicta*, delivered in a litigation brought in bad faith (complainants' brief, pp. 182–183).

Judge Bradford did not pass upon the merits, but held that the case was not ripe for final hearing.

The only judicial action upon the merits ever had was in the opinion of the majority of the court below, from which Circuit Judge Gray dissented, and this court is now about to consider whether or not the

learned majority did not err both in passing upon the merits and in their view of the merits.

VI.

As we have already seen (complainants' brief, p. 140), immediately after the rendition of the judgment of this court in the Government suit, the directors of the Northern Securities Company hastened to exculpate themselves in the eyes of the world and proclaimed in their famous circular of March 22, 1904 (record, p. 152):

> "The company's acquisition of Northern Pacific and Great Northern shares was made in the full belief that such purchases were in no wise obnoxious to any law of the United States—an opinion which has received the approval of four justices of the Supreme Court of the United States, namely, Mr. Chief Justice Fuller, and Associate Justices Edward D. White, Rufus W. Peckham and Oliver Wendell Holmes, in the suit brought by the United States against the right of the company to hold and vote the shares. However, the majority of the court, disregarding as irrelevant any beneficial increase of commerce, was of the opinion, that as a matter of law your company's holding of the stocks of the two railway companies in itself constituted a restraint of interstate commerce prohibited by the so-called Sherman act of 1890."

It will also be recalled that, in the Government suit, the defendants pleaded that the parties had acted in good faith and with innocent intent, the language of the answer of the Northern Securities Company being as follows (present record, p. 99):

> "So far from intending to violate any provision of said act of Congress, the persons who were concerned

> in organizing this defendant and those who have sold their shares to it had every reason to believe and did believe that such sales were not in any way in contravention of that act."

The answer of Messrs. Hill, Clough, Kennedy, James and Baker, original promoters and directors of the Northern Securities Company, was substantially to the same effect (p. 115).

Yet, in order to support the present defense of *in pari delicto*, we are now told in defendant's first brief that the combination, as alleged in the bill of the United States in the Government suit, as found and declared by the Circuit Court in Minnesota in and by its decree, as found and declared by this court in affirming such decree, and as alleged in the present bill (defendant's first brief, p. 61)—

> " was precisely the kind of confederation that over and over again the courts had held to be illegal. Upon that point no lawyer and no business man of intelligence in the United States, could possibly have had a moment's doubt."

But, later on, the same brief contains the following statement (p. 84):

> " They [complainants] entered the combination with full knowledge of its character and purpose, and for more than two years participated in its proceedings. But they seek to offset their admission by an allegation that then and during the pendency of the Government proceedings they believed the transaction to be lawful. *This we do not doubt, for such was the honest belief of all parties until the recent adverse decision by a court nearly equally divided.*"

VII.

In defendant's first brief, the complainants and their motives are severely criticized, and it is, among many other things, said (p. 98):

> "The unlawfulness of the acts done was brought sharply to their attention by the filing of the Attorney-General's bill."

May it not with equal truth and force be said that this "unlawfulness" was also brought sharply to the attention of Mr. Hill and the other directors of the Northern Securities Company, who were defendants in the Government suit and charged with a conspiracy in violation of an act of Congress? Were they not nevertheless professing to all the world that they had done nothing unlawful? Was it not brought sharply to the attention of these gentlemen that they ought not, during the pendency of the Government suit, to sell stock to the public and attempt to mislead innocent people? What did Mr. Hill say to his fellow directors which induced them, *six months after the institution of the Government suit and in anticipation of the final hearing*, to agree to a sale of an enormous amount of the stock to the public? Was he thinking that it would be "advisable" to attempt to create equities and elements of estoppel? What was it that Mr. Hill said to the directors who were in his confidence? All he tells us in his letter of September 10, 1902, to the Northern Securities Company is, "having discussed with some of your directors the *advisability* of the issuance of additional stock and the sale thereof, and after that discussion such issuance and sale having been deemed *advisable*," etc. (record, p. 318). Why was it

advisable in the teeth of the Government suit? Had not "the unlawfulness of the acts done" been brought "sharply to the attention" of Mr. Hill and the directors in whom he *confided* his secret reasons, as well as to the attention of every individual in the community? Did not every purchaser of the cash stock, every speculator who bought into the situation, acquire with full knowledge of "the unlawfulness of the acts done"? Was not this "brought sharply" to the attention of the whole world "by the filing of the Attorney-General's bill"? Is it not the crucial point in this defense of estoppel, which explodes its fallacy, that all acted in disregard and defiance of the charge of unlawfulness sharply brought to their attention by the Government suit, and that no court can permit parties so acting to acquire legal rights thereby? See further discussion of estoppel in complainants' brief, p. 129 *et seq.*

Then there follows in the same brief a statement in regard to the assigns of the original depositors (p. 110), viz.,

> "The Circuit Court, in its decree, expressly recognized the rights of such persons as may now be the holders and owners of Securities stock."

How did the Circuit Court in Minnesota recognize those rights? Did it declare that, notwithstanding the illegal purposes for which the stocks of the railway companies had been acquired and were held by the Northern Securities Company, the latter had nevertheless become the legal owner under an illegal and void contract? Did it hold that the assigns of original depositors had acquired greater rights than such original

depositors or than the corporation itself? Did it hold that such purchasers *pendente lite* had succeeded in creating an estoppel which changed what was an illegal and void contract into a valid and enforceable contract? No, emphatically no. On the contrary, in answer to the plea advanced by the defendant Securities Company and by Messrs. Hill *et al.*, that all parties had believed in the legality of the transaction, the Circuit Court and this court said that the assigns of the original depositors would be entitled to the same rights as the original depositors themselves, and no more. So reads the decree as affirmed by this court (record, p. 151), viz.,

> "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The defense of estoppel is fully discussed in complainants' brief at pages 129–137, and the authorities are there cited which declare the settled rule of law and public policy that an illegal contract cannot be validated by estoppel (see also at p. 51 *et seq.*), and that any

purchaser, speculator, jobber or money changer "who intermeddles with property in litigation does it at his peril." No language could be more emphatic on this point than that of Mr. Justice White in *California Bank* v. *Kennedy*, 167 U. S. 362, 367; and no more is needed than the statement that "it is true that parties to an illegal contract cannot by estoppel make the contract legal" (defendant's first brief, p. 111).

VIII.

After much discussion as to what this court did decide in the Government suit, the following are the present contentions of the Northern Securities Company. In defendant's second brief (p. 56), defendant states:

> "A majority of the court, although by apparently different and dissimilar processes of reasoning, decided that *all purchases* of the stocks by the Securities Company had been prohibited by a statute which the Government had made."

And in defendant's third brief (p. 36), is the following candid statement:

> "We accept the decree as determining, for the purposes of this appeal, the illegality of the combination."

Therefore, we may, at last, assume, as the starting point on the merits, that the Northern Securities Company, notwithstanding what it has heretofore argued, now concedes that this court did decide "that *all* purchases"—necessarily including the purchases from the complainants—"had been prohibited by a statute which the Government had made," and that the combination in pursuance of which all of the stock "was *acquired* and is now *held*" was illegal.

The discussion of the general principles of law on the subject of the legal effect of contracts entered into in violation of a statute seems to have been assigned to defendant's third brief, where, under the heading (p. 44), "*That transaction was not void because illegal*," the leading case of *Harris* v. *Runnels*, 12 How. 79, and analogous cases are cited, which, as is well known, establish the doctrine that a contract in violation of a statute will not be declared void if the court is satisfied from the statute that it was the intention of the lawmakers that it should not have that effect (*vide*, *McCormick* v. *Market Bank*, 165 U. S. 538, 552; *California Bank* v. *Kennedy*, 167 U. S. 362, 367; *Burck* v. *Taylor*, 152 U. S. 634, 648).

Defendant quotes a part of a sentence in the *Harris* case as follows (defendant's third brief, p. 45):

> "The statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so."

Yet, it must have been overlooked that this excerpt from the opinion of the court was *preceded* by the following statement of the law (12 How. 83):

> "Contracts in violation of statutes are void; and they are so whether the consideration to be performed or the act to be done be a violation of the statute.
>
> "A statute may either expressly prohibit or enjoin an act, or it may impliedly prohibit or enjoin it, by affixing a penalty to the performance or omission thereof. It makes no difference whether the prohibition be expressed or implied. In either case, a contract in violation of its provisions is void. The rule is certain and plain."

And it must also have been overlooked that the above quotation in defendant's brief was followed in the opinion in the *Harris* case by the following (p. 84):

> "When the statute is silent, and contains nothing from which the contrary can be properly inferred, *a contract in contravention of it is void.*"

Another case cited in the same brief (p. 46) is *Burck* v. *Taylor*, 152 U. S. 634, in which Mr. Justice Brewer delivered the opinion of the court and said (p. 649):

> "But it has never been doubted that, as a general rule, *a contract made in contravention of a statute is void* and cannot be enforced, and the only exception arises where, from an examination of the statute, the courts are able to discern a different or a limited purpose on the part of the lawmakers."

The other authorities cited in defendant's brief are, so it seems to complainants' counsel, equally wide of the mark.

IX.

It has been the contention of the complainants from the beginning that to allow a distribution *pro rata*, as proposed, on the theory that the Northern Securities Company *owned* the railroad stocks, would be but carrying into effect the illegal contract of purchase, and that any attempt to treat the stock as so *owned* by the Securities Company would be in conflict with and disregard of the decree in the Government suit. If the legal effect of an adjudication that a corporation has acquired and *holds* property in violation of a statute be that it did not thereby acquire title to and ownership of the property, because the contract of purchase and

holding was void, then any attempt, as in the case at bar, to treat the property as *owned* by the corporation would be in conflict with the adjudication and tend to circumvent and nullify it. It is now apparently avowed that what the Securities Company is doing is endeavoring to perform a part of the *illegal* contract of purchase. If words mean anything, the defendant's briefs convey and are intended to convey that distinct meaning. Thus, in defendant's second brief, we have the statement (pp. 81–82):

> "A ratable distribution, in which equality between all stockholders, in proportion to their respective holdings, is preserved, is recognition and performance by it of its obligation to them. Hence, the Securities Company, by proposing ratably to distribute these railway stocks among its own stockholders, including Harriman and Pierce, is not proposing to repudiate, nor to terminate, the contract with them, arising out of and accompanying the act of making them stockholders.
>
> "*On the contrary, it is an express and formal recognition, by the Securities Company, of the continued existence and binding force of that contract, and is performance of it.*"

And later on in the same brief, we have the following (p. 103):

> "Undoubtedly it was the right of these plaintiffs, at any time since acquisition by the Securities Company of a majority of both railway stocks, to demand of the company that it should rid itself of the power thus unlawfully held. But that right did not include one to insist on a specific return of what had been sold to the company."

It will be said that the context shows that defendant was discussing, not the illegal contract, but some other contract; that there were two contracts growing out of the same illegal transaction, one of purchase and sale,

concededly illegal; the other, a contract fixing the relations of stockholders among themselves and between them and the corporation, claimed to be legal, and that the latter will be enforced by the courts. In other words, the conclusion to which this reasoning leads us is that the second contract has validated the first and vested title in the Securities Company! But, of course, there was only one contract, and the illegality affected every part of it, express or implied. *Scovill* v. *Thayer*, 105 U. S. 143, 150.

Throughout the defendant's briefs filed in this court, it is repeatedly asserted that the only transaction between Messrs. Harriman and Pierce and the Northern Securities Company was that of an unconditional purchase and sale, and that it nowhere appears in the evidence that there was any other understanding. What difference can that make? The contract, whatever the intent, was illegal and void. But the objects for which the Northern Securities Company was organized are, as shown in complainants' brief at pages 96–103, established beyond contradiction or possibility of peradventure by the proofs in the present record, even if we disregard wholly the proceedings in the Government suit and the conclusive effect of the decree.

Complainants have not pretended that when Harriman and Pierce delivered the Northern Pacific stock to the Northern Securities Company on November 18, 1901, there was any exchange of agreements as to what the Securities Company intended to do with the stock or what it would do in the future, for that was wholly unnecessary. It was sufficient that prior to that time

Mr. Harriman, although not a party to the original combination, knew the purposes for which the company had been organized and the plans of its promoters. Consequently he must have dealt with the Northern Securities Company in the light of that knowledge.

However, it is now no longer necessary to argue the point, for it is practically conceded in defendant's second brief (p. 102) in the following language:

> "Harriman and Pierce did not sell the Northern Pacific shares to the Northern Securities Company in ignorance of the plans of the latter's projectors, nor of the nature of the transactions the company itself both contemplated and made. . . . Harriman and Pierce cannot deny perfect knowledge of the effect of ownership by the Securities Company of a majority of the two railway stocks. They cannot deny knowledge that such ownership carried power in the owner to restrain trade, and therefore, in effect would itself amount to such restraint. Their sole mistake, if any, lay in the supposition that this particular kind of restraint had been overlooked by Congress, and had not been included with the others prohibited by the Anti-Trust Act."

X.

We may now consider the defendant's contention that there was no conversion of Northern Pacific preferred stock into common stock (see discussion in complainants' brief at pp. 163–166) and that complainants cannot enforce any agreement to convert because it was part of the illegal contract. Of course, complainants cannot enforce any part of an illegal and void contract. The illegality is exhibited only for the purpose of disaffirming the illegal and void transaction, not to enforce it. The point of complainants' contention is quite misap-

prehended by defendant. It is not claimed that complainants are entitled to the preferred stock because part of the agreement of deposit was to the effect that there should be a conversion, but because, as matter of fact, the complainants' preferred stock has been actually converted into common stock. The agreement is alleged for the purpose of showing and explaining the conduct of the parties. The legal right to recover is based upon the fact that the defendant, holding as it did and does under an illegal and void contract, converted complainants' property, that is, its Northern Pacific preferred stock, into common stock, and that—

> "Whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them." *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68.

The defendant further suggests in regard to the conversion of the preferred stock as follows (defendant's first brief, p. 114):

> "The allegation of the bill certainly is, and will be seen to be, in defiance of the facts.
>
> "The averment of Mr. Harriman is true only if meaning that, *as to the Northern Pacific Company, all* of its $75,000,000 preferred stock was converted into $75,000,000 of new common stock. It is grotesquely misleading, if understood as asserting that any holder of preferred stock had or acquired or exercised any right to obtain new common stock in exchange for his preferred stock. . . .
>
> "The testimony on this point will repay careful consideration."

Now, what are the facts as actually disclosed in the record before the court, and in what way will the

testimony repay careful consideration, except to confirm complainants' theory?

The bill alleges (record, p. 6) as follows:

> "that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for $34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid."

In addition Mr. Harriman swore to the truth of a similar allegation in the amended bill (pp. 155, 376).

Mr. Harriman's uncontradicted affidavit is to the following effect (p. 159):

> "As a director of the Northern Pacific Railway Company, I know that all of its preferred stock issued and outstanding in November, 1901, consisting of $75,000,000 par value of shares of $100 each, has been converted into common stock of the company through the medium of convertible certificates, which were immediately after issue changed into a like amount of the common stock of the company at par. As a director of the Northern Securities Company, I know that the company did not in November or December, 1901, have any funds with which to pay cash for $34,709,062

of Northern Pacific convertible certificates except through or by means of the preferred stock so delivered by Mr. Pierce and myself on November 18, 1901. As to the proceeds or credits in respect of the remaining $6,375,938 par value of the preferred stock, I have no knowledge, but I always understood that the whole amount of the $41,085,000 of preferred stock so delivered to the Northern Securities Company by Mr. Pierce and myself had been actually converted into common stock."

Mr. Hill testified in the Government suit (present record, pp. 166–167), as follows:

"A. As soon as the notice was given to redeem the preferred stock of the Northern Pacific, my recollection is that a number of the preferred stockholders surrendered their stock, took their certificates for their common and converted them. Now, it may be, and I think quite likely, that that is what was done by Mr. Morgan or his firm with the Harriman preferred stock. I know that others did that."

The affidavit of Mr. William Mahl, read in support of complainants' verified bill, was to the following effect (p. 178):

"IV. The books of said Securities Company show that the alleged retirement of $34,709,000 of said preferred stock, the purchase of $34,709,062.50 of the convertible bonds or 'convertible certificates of indebtedness' of the Northern Pacific Railway Company and the conversion of said bonds into the common stock of said railway company referred to in the affidavit of Edward T. Nichols, verified on the 2d day of May, 1904, occurred on the same day, to wit, the 27th day of December, 1901, and appear to have been different parts of and together constituting actually but one transaction."

Mr. Millar's affidavit, also read in support of complainants' bill, was to the following effect (record, pp. 371–372):

> "VI. On or about the 13th day of November, 1901, the board of directors of the Northern Pacific Railway Company resolved to retire the preferred stock through an issue of bonds which bonds were to be convertible into new common stock of an amount equal to the pre-existing preferred stock, namely, $75,000,000 par value; that said preferred stock was subsequently so retired, and that the whole amount thereof was thereupon converted into an equal amount of common stock."

The defendant's only argument against all this proof is that the *form* of the resolutions and documents should control as against the reality, the shadow as against the substance, the mask as against the true face (*vide* complainants' brief, pp. 89–95). Yet all this line of argument was used in the Government suit, but, as Circuit Judge Thayer said, a court of equity "looks always at the substance of things . . . rather than upon the particular devices or means by which it has been accomplished" (120 Fed. Rep. at p. 726).

Is it then a wonder that, notwithstanding the forms adopted and phrases used, the Circuit Court of Appeals for the Eighth Circuit, following the only statutory authority for the proceeding, namely, to convert preferred into common stock (Wisconsin Laws 1895, c. 244, § 10, referred to in the resolution which authorized the conversion, record, p. 284), said in *Weidenfeld* v. *Northern Pac. Ry. Co.*, 129 Fed. Rep. 305, 309:

> "*The issue of the convertible certificates and their sale, the retirement of the preferred stock with the pro-*

ceeds, the retirement in turn of the certificates themselves, and the issue of an equal amount of common stock of the company constituted in a larger sense but steps to one ultimate act, and that act was the conversion of the preferred stock into the common stock of the company."

There can be no doubt that Mr. Harriman acquiesced in the illegal method of conversion, which excluded the holders of preferred stock from any rights in respect of the common stock into which their own stock was being converted, as part of one and the same transaction by which he agreed to accept Northern Securities stock. Thus he states in his affidavit (record, p. 158):

> "The conversion under conditions reducing the Oregon Short Line holdings to a minority was then a foregone conclusion unless we were prepared to commence litigation, which would be protracted and which would probably be detrimental to the value of all railroad securities in view of the condition of the financial markets resulting from the panic of May 9, 1901. The alternative of not accepting shares of the holding company, but holding the minority interest in the Northern Pacific Company, involved serious risks of great loss, as it would then be to the interest of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. It was, therefore, finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holdings of Northern Pacific stock for $82,491,871 par value of the stock of the holding company and $8,915,629 in cash. Some time after the terms of the agreement had been settled, and on November 18, 1901, Messrs. J. P. Morgan & Co. notified me to deliver the Northern Pacific stock to the Northern Securities Company, and informed me that such company would close the transaction, and that we would receive from it the stock and cash payment agreed upon."

XI.

In opposition to the complainants' contention that even if restoration of the *status quo* be not practicable, the assets of the company should be sold and a distribution made in cash, the following suggestion is submitted by defendant, after going outside the record to refer to present values (defendant's second brief, pp. 93–94):

> "An operation like the sale of these stocks would shake to the bottom the financial fabric of both America and Europe. Nothing comparing with it has ever been undertaken."

This statement will, of course, strike the court as obviously unsound in view of the frequent sales of railroad properties involving equally large values. It has never yet been seriously suggested by any court that on the dissolution or reorganization of a railroad company, the stockholders of the company could be forced against their will to become stockholders in a new or different railroad corporation. No one would for a moment venture, in connection with the winding up or dissolution of a railroad corporation, seriously to contend that the stocks held by such railroad corporation need not be sold and the proceeds distributed, but could be forced on non-assenting stockholders against their will.

XII.

Finally, the court will find throughout defendant's briefs a repetition of the contentions advanced in the Government suit in almost the same language, and we

are led again and again around the same circle of reasoning. In one part of the defendant's briefs, it is conceded that the decision of this court in the Government suit established the illegality of the purchase, yet in another part we are told that the question was not settled at all by that decision, but still "is at best doubtful," and "that the power is doubtful cannot be disputed in the light of the opinion . . . of Mr. Justice White in the Government suit" (defendant's third brief, p. 48). What is meant by that suggestion? Is the idea sought to be conveyed that the question decided in that case is still open and is now to be reargued? Is it possibly the notion that any justice of this court will not recognize the decision in that case as settling the questions there decided for every purpose affecting the Northern Securities Company?

Then follows another extraordinary argument under the heading (p. 48), "*The transaction was not void because ultra vires.*" It is contended that the acquisition and holding of the stocks of the railway companies adjudged in the Government suit to have been illegal and in violation of an act of Congress, nevertheless was authorized by the laws of the state of New Jersey and, therefore, not *ultra vires*. In order that there may be no possibility of not appreciating the purport of this argument, it ought to be quoted at length (defendant's third brief, p. 48):

> "It was within the power of the Company, according to the language of the certificate, and was expressly authorized by the New Jersey law. Section 51 provides: 'Any corporation may purchase . . .

> the shares of the capital stock of . . . any other corporation or corporations of this or any other state . . .' Whether an act of a corporation is *ultra vires* or not, is determined by the law of the state which created it. No other state or sovereignty can enlarge or limit the corporate powers or capacity. It may forbid the corporation from doing some or even any acts within its jurisdiction; transactions so forbidden will be illegal, but not *ultra vires*. Corporations, like natural persons, are subject to the laws which operate generally upon persons. If they violate such laws, their action is illegal, perhaps criminal, but it is not *ultra vires*, if it is within the power given it by its charter. The violation of a federal statute by a state corporation cannot give rise to a case of *ultra vires*. But even if the transaction were *ultra vires*, it would not for this reason be void."

Yet, if there be one doctrine which is the settled law of this court, it is that a contract made by a corporation in violation of express statutory prohibition is *ultra vires* and absolutely void, that the objection is not merely that the corporation ought not to have made it but that it could not make it, and that such a contract cannot be ratified or confirmed or given validity for any purpose or be the foundation for any right (complainants' brief, pp. 51–55).

Defendant's third brief then proceeds to contend (pp. 49–50) that the cases in this court "to the effect that contracts *ultra vires* are void" have no application because, forsooth, "the Securities Company is a New Jersey corporation" and "the effect of its acts is to be determined by the law of New Jersey."

The learned counsel for the defendant seem to expect this court to listen patiently to the contention that a contract forbidden to a corporation by an act of

Congress is not *ultra vires* for the reason that the corporation was organized under the laws of a state and that such laws authorized it to do the very act prohibited by the act of Congress! It seems, indeed, to be again forgotten that the Constitution of the United States has declared for all time and for every case that any act of Congress made in pursuance of the Constitution is to be the supreme law of the land.

According to the view of the learned counsel for the Northern Securities Company, however, "the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation," and the laws of a government declared to be supreme must be subordinated to the laws of a local and state government whose legislation, when in opposition to acts of Congress, was declared not to be supreme. *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 433.

As Mr. Justice Harlan said in the Government suit (193 U. S. 349–350):

> "If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words."

WASHINGTON, D. C., February 27, 1905.

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